FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

In the matters of	)	
	)	
American Federation of Labor and	)	**MURs 4291, et al[1]**
Congress of Industrial Organizations, et al.	)	

STATEMENT FOR THE RECORD

COMMISSIONER SCOTT E. THOMAS

On July 11, 2000, the Commission approved the General Counsel's recommendation to take no further action and close the files with respect to all respondents in the above-captioned matters. At issue was whether the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") or its affiliates had "coordinated" certain election-related public communications during the 1996 election cycle with federal candidate or political party committees and thus had made "in-kind" contributions to those committees. Under the Federal Election Campaign Act ("the Act"), corporations and labor organizations may not make contributions (including coordinated in-kind contributions) in connection with federal election campaigns. 2 U.S.C. § 441b. Based upon the standard for coordination created by the district court in *Federal Election Commission v. Christian Coalition*, 52 F.Supp.2d 45 (D.D.C. 1999), the Office of General Counsel found insufficient evidence that respondents improperly coordinated its activities with a federal candidate or party committee.

In my view, the Commission should not have applied a 1999 district court ruling in deciding whether 1995/1996 activity constituted impermissibly coordinated activity. Rather, the Commission should have looked to the regulations currently on the books which define "coordination." Indeed, as a matter of administrative law, the Commission has an obligation to apply those regulations. This is particularly true where, as here, those regulations address Supreme Court and congressional concern. By contrast, the *Christian Coalition* ruling is nowhere reflected in the Commission's current regulations and so narrowly defines coordination that it threatens to undermine the Act's limitations and prohibitions.

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[1] These MURs included MURs 4291, 4307, 4328, 4338, 4463, 4500, 4501, 4513, 4555, 4573, and 4578.

With two Commissioners recused and at least two other Commissioners supportive of the *Christian Coalition* approach, however, I could imagine no circumstances under which these matters could proceed by applying the Commission's current regulations. With only four Commissioners participating, my vote to oppose closing these matters would have only kept these matters permanently unresolved. Accordingly, I voted to support the General Counsel's recommendations to take no further action regarding these matters and to close the file. I would have preferred that this matter be considered under the Commission's current regulations after probable cause briefing. Even if violations were found in these matters (and there is no way to predict, absent probable cause briefing, what result might obtain) and a minimal civil penalty agreed to, an outcome reached by applying the Commission's current coordination regulations is far more preferable than embracing the *Christian Coalition* definition of coordination.

I.

The definition of "coordination" found in *Christian Coalition* directly undercuts the effectiveness of the Federal Election Campaign Act ("the Act"). In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court upheld limits on contributions to federal candidates but ruled that a similar limitation on independent expenditures was unconstitutional. The Court recognized, however, that its ruling created many opportunities for evasion of the contribution limitations. If a would-be spender was able to pay for a television advertisement provided by a candidate, for example, this "coordination" would convert what is supposed to be an "independent" expenditure into nothing more than a disguised contribution. Indeed, the *Buckley* Court warned that the contribution limitations would become meaningless if they could be evaded "by the simple expedient of paying directly for media advertisements or for other portions of the candidate's campaign activities." *Id.* at 46.

In order to "*prevent attempts to circumvent the Act through* prearranged or *coordinated* expenditures amounting to disguised contributions," *id.* at 47 (emphasis added) the *Buckley* Court treated "coordinated expenditures. . . as contributions rather than expenditures." Id. at 46-47 (emphasis added). Thus, the *Buckley* Court drew a specific distinction between expenditures made "*totally independently* of the candidate and his campaign" and "coordinated expenditures" which could be constitutionally regulated. The Court defined "contribution" to "include not only contributions made directly or indirectly to a candidate, political party, or campaign committee . . . but also *all* expenditures placed in cooperation with or with the consent of a candidate, his agents, or an authorized committee of the candidate." Id. at 78 (emphasis added). Reacting to these judicial concerns, Congress enacted as part of the Federal Election Campaign Act Amendments of 1976 a definition of "independent expenditure" now codified at 2 U.S.C. §431(17). Concerned that independent expenditures could be used to circumvent the contribution limitations,[2] Congress preserved the distinction drawn by the Supreme Court

[2] *See, e.g.*, Federal Election Campaign Act Amendments, 1976: Hearings on S.2911, et al., Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration, 94th Cong., 2d Sess. 74

between those expenditures which were "totally independent" of the candidate's campaign and those which were not.[3]

The current language of the Act reflects the judicial and legislative concern that independent expenditures are not turned into disguised contributions through coordination with the candidate or his campaign. The Act squarely states that an expenditure made "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate" and subject to the contribution limitations. 2 U.S.C. §441a(a)(7)(B)(i). Moreover, section 431(17) of the statute defines "independent expenditure" as:

> [A]n expenditure by a person expressly advocating the election or defeat of a clearly identified candidate which is made *without cooperation or consultation* with any candidate, or any authorized committee or agent of such candidate, *and which is not made in concert with, or at the request or suggestion of,* any candidate, or any authorized committee or agent of such candidate.

2 U.S.C. §431(17)(emphasis added).

Section 109.1(b)(4)(i) of the Commission's regulations "clarif[ies] this language"[4] and explains that an expenditure will not be considered independent if there is "[a]ny arrangement, coordination, or direction by the candidate or his. . . agent prior to the publication, distribution, display or broadcast of the communication." 11 C.F.R. §109.1(b)(4)(i). The regulations further state that an expenditure is presumed not to be independent if:

> (A) Based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made; or
> (B) Made by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent.[5]

Id.

(remarks of Sen. Kennedy); 77 (remarks of Sen. Cannon); 77 (remarks of Sen. Scott); 85 (statement of Sen. Mondale); 89 (remarks of Sen. Griffin); 98 (remarks of Sen. Buckley); 107-08, 130 (remarks of then Assistant Attorney General Scalia).

[3] H.R. Conf. Rep. 94-1057 at 38 (1976). Specifically, the Conference Report states: "The definition of the term 'independent expenditure' in the conference substitute is intended to be consistent with the discussion of independent political expenditures which was included in *Buckley v. Valeo*." *Id.*

[4] *FEC v. National Conservative Political Action Committee*, 647 F.Supp. 987, 990 (S.D.N.Y. 1986).

[5] *Id.*

The statute and the Commission's regulations recognize that a narrow view of coordination would open a large loophole in the law. If, for example, a finding of coordination required some sort of "agreement" between a candidate and a spender, a candidate could set up a meeting with an organization known to be planning campaign ads, and could discuss campaign strategy and the development of issues crucial to the campaign. The organization could then make "independent" expenditures based on this detailed knowledge and information. The only apparent restriction would be that a campaign could not "agree on" the final finished ad or actually authorize a buy for the timing and placement of the ad. Obviously, such a limited approach would render the coordination standard meaningless.

The district court opinion in *Christian Coalition*, however, effectively ignored the Commission regulations on what constitutes "coordination." Instead, the district court created its own definition of coordination. This judicially created definition of coordination bears little semblance to either the "totally independent" approach of *Buckley*, the language of the statute or the Commission's regulations.

In its lawsuit, the Commission charged the Christian Coalition repeatedly spent its corporate treasury funds to influence federal elections in violation of the FECA. Based on the record evidence, the Commission alleged the Christian Coalition's leadership and its staff repeatedly cooperated and consulted about campaign strategy and activities with several different Republican candidates, their campaigns, and the National Republican Senatorial Committee. The Commission alleged these coordinated expenditures constituted in-kind corporate campaign contributions made in violation of 2 U.S.C. §441b. The Commission also detailed, based on the record, numerous instances where it believed the Christian Coalition unambiguously advocated the election or defeat of specific clearly identified candidates in violation of the Act's prohibition on independent corporate campaign expenditures.

With respect to coordination, the district court ruled against the Commission on five of the six coordinated expenditure allegations and found that there was a contested issue of fact on the sixth. In the opinion of the district court, the Supreme Court in *Buckley* did not address "the First Amendment concerns that arise with respect 'to expressive coordinated expenditures." 52 F.Supp.2d at 85. The district court speculated: "It can only be surmised that the *Buckley* majority purposely left this issue for another case. In many respects this is that case." *Id.* As a result the district court felt free to ignore the §441a(a)(7)(B)(i) standard of coordination as well as the Commission's regulations.

Instead, the district court created its own standard of coordination and applied it to a new concept, which it also developed, known as "expressive coordinated expenditures." The district court concluded that "the First Amendment requires different treatment for 'expressive,' 'communicative' or 'speech-laden' coordinated expenditures, which feature the speech of the spender, from coordinated expenditures on non-communicative materials, such as hamburgers or travel expenses for campaign staff." *Id.* at 85 n.45. The

district court then defined an "expressive coordinated expenditure" as an expenditure "for a communication made for the purpose of influencing a federal election in which the spender is responsible for a substantial portion of the speech and for which the spender's choice of speech has been arrived at after coordination with the campaign." *Id.* The court then developed its own test for coordination:

> In the absence of a request or suggestion from the campaign, an expressive expenditure becomes "coordinated[]" where the candidate or her agents can exercise control over, or where there has been substantial discussion or negotiation between the campaign and the spender over, a communication's: (1) contents; (2) timing; (3) location, mode, or intended audience (e.g., choice between newspaper or radio advertisement); or (4)'volume' (e.g., number of copies of printed materials or frequency of media spots). Substantial discussion or negotiation is such that the candidate and spender emerge as partners or joint venturers in the expressive expenditure, but the candidate and the spender need not be equal partners. This standard limits §441b's contribution prohibition on expressive coordinated expenditures to those in which the candidate has taken a sufficient interest to demonstrate that the expenditure is perceived as valuable for meeting the campaign's needs or wants.

Id. at 92.

Based upon this analysis, and not the statute or the Commission's regulations, the district court found that there was no improper coordination between the Christian Coalition and Bush-Quayle '92, Helms for Senate, Inglis for Congress, Hayworth for Congress, or the National Republican Senatorial Committee.

The district court's test for coordination weakens important provisions of the Act. Let us suppose that Candidate Smith is slightly behind in the polls, low on money, and needs help. It is the week before the election and he knows that a corporation is planning to run an "issue" advertisement to assist the Smith campaign. Smith contacts the president of the corporation and complains that nobody has focused on an important matter in the campaign: various problems in the personal life of his opponent, Congressman Jones. Because of this oversight, candidate Smith believes that Congressman Jones is viewed in a better light by the electorate. Candidate Smith, however, does not want to run such an advertisement himself for fear of being accused of negative advertising.

During his meeting with candidate Smith, the wealthy supporter says, "That's a great idea! Thanks for the information." After the meeting, the wealthy supporter changes the advertisement to say: "Congressman Jones is a liar, tax cheat and a wife-beater—keep that in mind on Tuesday." The advertisement runs on the weekend before the election. Is this a coordinated expenditure? Would it make a difference if the wealthy

contributor said nothing during his meeting with the candidate? As we understand the district court's opinion, there would no coordination between the candidate and the spender since there was no "substantial discussion or negotiation" such that they appeared to be "partners or joint venturers." 52 F.Supp.2d at 92. This is particularly true if the spender said nothing in response to the candidate's entreaty. Under the Commission's regulations, however, it would appear that this expenditure was a disguised contribution and coordinated because it was "based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate's agents, with a view toward having an expenditure made." 11 C.F.R. 109.1(b)(4)(i). This would appear to be the more appropriate result given the ease with which "coordination," and thus, the contribution limits can be so easily evaded under the district court's test.

To its credit, the district court recognized the difficulty of its task and virtually invited the Commission to file an interlocutory appeal on the matter to the United States Court of Appeals for the District of Columbia Circuit: "This Court is of the opinion that this Order in relation to Counts I, II, and III involves controlling questions of law as to which *there is substantial ground for difference of opinion and that an intermediate appeal from the order may materially advance the ultimate termination of the litigation*."52 F.Supp.2d at 98 (emphasis added). Commissioners Sandstrom, Elliott, Mason and Wold, however, voted to end the Commission's enforcement litigation against the Christian Coalition and not appeal the matter[6]

In my view, the Commission should not adopt the *Christian Coalition* definition of "coordination." It is an approach which threatens the restrictions and requirements of the statute. Moreover, this judicially created definition completely ignores the definition of "coordination" properly promulgated in the Commission's regulations. The Commission devoted considerable resources to investigating this matter under the regulations currently on the books only to now find that at least three Commissioners favor an interpretation posited by a single district court judge. *See, e.g., FEC v. Christian Coalition* (Commissioners Elliott, Mason, Sandstrom and Wold voted not to appeal district court decision); *see also* MUR 4378 Statement of Reasons of Commissioners Wold, Elliott and Mason at 9. In my view, the Commission should have continued to apply its current regulations and not the *Christian Coalition* approach. By its failure to do so, the Commission has created considerable uncertainty as to which standard of coordination should be applied in the future. As the instant matters demonstrate, this uncertainty will come at great expense in time, effort and energy to the Commission and the regulated community.

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[6] Clearly, the Commission should not have dropped a significant enforcement action such as the *Christian Coalition* case and wrested resolution of these important issues away from the Article III courts. The decision of a single district court certainly cannot resolve these important issues. Indeed, the decision of the district court in *Christian Coalition* is not binding precedent on any other federal court, even in the same district. *See, e.g., In re Korean Air Line Disaster*, 829 F.2d 1171, 1176 (D.C.Cir. 1987)("Binding precedent for all [circuits] is set only by the Supreme Court, and for the district courts within a circuit, only by the court of appeals for that circuit"), *aff'd*, 490 U.S. 122 (1989).

II.

Rather than follow the definition of coordination created out of whole cloth by the district court in *Christian Coalition*, the Commission in these matters should have followed the definition for coordination found in the Commission's regulations. Indeed, an administrative agency's obligation to follow its own rules and regulations is one of the most basic tenets of administrative law:

> *It is elementary that an agency must adhere to its own rules and regulations. Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned, *Teleprompter Cable Systems v. FCC*, 543 F.2d 1379, 1387 (D.C.Cir. 1976), for therein lies the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action. *Simply stated, rules are rules, and fidelity to the rules which have been properly promulgated, consistent with applicable statutory requirements, is required of those to whom Congress has entrusted the regulatory missions of modern life.*

Reuters LTD. v. F.C.C., 781 F.2d 946, 950 (D.C.Cir.1986)(opinion of J. Starr)(emphasis added). Indeed, the courts sternly have lectured that:

> We do not believe [an agency] should have the authority to play fast and loose with its own regulations. It has become axiomatic that an agency is bound by its own regulations. *The fact that a regulation as written does not provide [an agency] a quick way to reach a desired result does not authorize it to ignore the regulation or label it 'inappropriate.'*

Panhandle Eastern Pipe Line Co., v. F.E.R.C., 613 F.2d 1120, 1135 (D.C.Cir. 1979)(emphasis added). *See U.S. Lines v. Federal Maritime Commission*, 584 F.2d 519, 526 n.20 (D.C. Cir. 1978)(it is well-settled that "an agency is not free to *ignore* or violate its regulations while they remain in effect")(emphasis added), *citing United States v. Nixon*, 418 U.S. 683, 693-696 (1974), *Service v. Dulles*, 354 U.S. 363 (1957), and *Accardi v. Shaughnessy*, 347 U.S. 260 (1954); *see also Memorial, Inc. v. Harris*, 655 F.2d 905 (9th Cir. 1980)("[I]t is by now axiomatic that agencies must comply with their own regulations while they remain in effect.").

Pursuant to its statutory authority, *see* 2 U.S.C. § 437d(a)(8), the Commission put into place regulations defining what is coordination. These regulations did not steal upon an unsuspecting Commission. The Commission approved these carefully crafted regulations after considering all the comments and testimony submitted in the rulemaking process as well as the pertinent case law, including *Buckley v. Valeo, supra.* These validly adopted regulations have the "force and effect of law."

Accardi v. Shaughnessy, supra; see also United States v. Nixon, supra, 418 U.S. at 695 ("So long as this regulation is extant it has the force of law.").

Obviously, it is possible for the Commission to amend or revoke the regulations defining what is coordination. But it has not done so. Indeed, last year the Commission published a supplemental notice of proposed rulemaking defining the term "coordinated general public political communication." 64 Fed. Reg. 68951 (Dec. 9, 1999). These proposed rules "are intended to incorporate into the Commission's rules the standard articulated by the United States District Court for the District of Columbia in the *Christian Coalition* decision." *Id.* The Commission, however, still has not adopted these regulations and it is possible that any final regulation will significantly differ in some respects from the *Christian Coalition* opinion.[7]

So long as the Commission's current regulations remain in effect and have the force of law, the six members of the Commission are bound to respect and enforce them. This approach is far preferable to a decision which ignores regulations on the books and, instead, seeks to apply standards which have not been promulgated and are only at the proposed rulemaking stage. In my view, failure to apply the current regulations may well expose the Commission to a §437g(a)(8) action alleging that the Commission's dismissal of this matter was contrary to law.

III.

It is unclear whether the Commission would have ultimately proceeded against respondents under the definition of coordination currently found in the Commission's regulations. On the one hand, the Office of General Counsel asserts in its close-out General Counsel's Report:

> The investigation has produced enough evidence *tending* to demonstrate that through the AFL-CIO's status as a "national partner" of the Coordinated Campaign, both the individual state AFL-CIO federations and AFL-CIO headquarters itself had access to volumes of non-public information about the plans, projects, activities, and needs of the DNC, the DCCC, the state Democratic parties, and in some instances individual candidates for Federal office. Moreover, the evidence shows that the AFL-CIO had not merely access to, but

[7] Moreover, there is little doubt that whatever regulatory standard the Commission develops, it will be subject to some future challenge and litigation. Indeed, one member of the regulated community reviewed the supplemental notice of proposed rulemaking creating a regulatory definition of coordination based on *Christian Coalition* and "predicted. . .that there would be negative comments on the new Commission proposal from business, labor and other groups." BNA, Money & Politics at 2 (December 3, 1999). This prediction has proven to be accurate. Negative comments have been made regarding the supplemental notice of proposed rulemaking, and the Commission is currently struggling to address them.

> authority to approve or disapprove, the DNC's and the state Democratic committees' plans for "Coordinated Campaign" activity.

MURs 4291, *et al.* General Counsel's Report at 18 (June 9, 2000)("June 9, 2000 General Counsel's Rreport")(emphasis added). The General Counsel's Report further stated:

> Under the interpretation of the law put forward by the Commission in the *Christian Coalition* case and cases prior to it, the sharing of this much information about the potential recipient committees' plans, projects, activities and needs would have been more than sufficient to taint the independence of any subsequent election-related communications to the general public by the AFL-CIO.

Id.

On the other hand, it is procedurally premature to suggest that the Commission, or even the General Counsel, would have settled on and eventually approved this analysis. For example, the General Counsel had not yet prepared or sent his General Counsel's Brief setting forth his "position on the factual and legal issues of the case and containing a recommendation on whether or not the Commission should find probable cause to believe that a violation has occurred." 11 C.F.R. §111.16(a). Nor had the respondents filed a brief "setting forth respondent[s'] position on the factual and legal issues of the case." 11 C.F.R. §111.16(c). Nor had the General Counsel, after reviewing the respondents' brief, advised the Commission on whether he "intended to proceed with the recommendation or to withdraw the recommendation from Commission consideration." 11 C.F.R. §111.16(d).

Adding to the uncertainty is the fact that the June 9, 2000 General Counsel's Report quoted above contains virtually no discussion of the current regulatory definition of "coordination" and its application to the particular facts of the instant matter; instead, the Report focuses almost entirely on its conclusion that "if the Christian Coalition standard governs these matters, further investigation of any strand of the investigation is unlikely to produce evidence of significant violations by the AFL-CIO or the committees with which it was in contact. June 9 General Counsel Report at 49.[8]

Even if violations were found in these matters, it is unclear what remedies would have been applied. I, for one, would have been happy to settle the case with a minimal

[8] There is a legitimate question regarding application of the coordination standards in the statute and regulations to support of a *party*, versus support of a particular *candidate*. The coordination rules deal with, e.g., requests or suggestions from "a candidate, his authorized political committees, or their agents." 2 U.S.C. §441a(a)(7)(B)(i); *see also* 11 C.F.R. §109.1(b)(4). Thus, before I could be persuaded to find probable cause to believe a violation occurred regarding in-kind support of the DNC or some state Democratic parties, I would need some analysis showing how the candidate-oriented coordination rules could be applied to such party-oriented activity.

civil penalty in order to establish that the Commission's current regulations and not the *Christian Coalition* case define the term "coordination."

While the substantive resolution of these matters under the Commission's current regulations is uncertain, it is clear to me that those regulations should have been applied. The *Christian Coalition* definition of "coordination" is so narrow and limited that it threatens any effort to enforce the requirements of the Act in a serious manner. Moreover, as a matter of administrative law, I fail to see how the Commission can simply turn its back on its current regulations and instead apply a standard which is still the subject of debate in a notice of proposed rulemaking. For these reasons, I believe the Commission should have resolved these matters under its current regulations.

As a practical matter, however, I can no longer see four votes on the Commission for enforcing those regulations. As such, it obviously would be unfair to apply the broader definition of coordination found in the current regulations against the respondents in the instant matters, but later apply the narrower and more lenient *Christian Coalition* standard to others. Moreover, a vote against the General Counsel's recommendation to close these matters would needlessly have kept these matters open where only four Commissioners were participating. As a result, I voted to adopt the General Counsel's recommendation to take no further action and to close the file in these matters.

9/5/00
Date

Scott E. Thomas
Commissioner